Marriage of Bostain

DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division II

State of Washington

Opinion Information Sheet

Docket Number: 30450-3-II

Title of Case: Marriage of Denise Bostain, Respondent v.

Learl (Larry) Bostain, Appellant

File Date: 05/17/2005

SOURCE OF APPEAL

Appeal from Superior Court of Cowlitz County

Docket No: 02-3-00205-1

Judgment or order under review

Date filed: 05/15/2003

Judge signing: Hon. Jill M Johanson

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of No. 30450-3-II

DENISE CHERYL BOSTAIN,

Respondent,

and

LEARL LEROY BOSTAIN, UNPUBLISHED OPINION

Appellant.

QUINN-BRINTNALL, C.J. Learl L. 'Larry' Bostain appeals a dissolution decree dividing property between him and his former wife, Denise C. Bostain, now known as Denise C. Nelson. He contends that the trial court erred in finding that a meretricious relationship existed before the couple's marriage and in failing to honor their 'non-marital agreement.' He also contends that the trial court improperly considered parol evidence

undermining both the non-marital agreement and a quit claim deed transferring interest in the parties' home from joint ownership to Bostain individually. Bostain also asserts that the trial court erred in entering a contempt order that he is unable to comply with and in imposing attorney fees and a penalty of $50 per day until he complies with the order.

We hold that the trial court did not err in finding a meretricious relationship existed prior to marriage. We also hold that the couple's 'non-marital' agreement was not a valid prenuptial agreement and did not establish the intent of the parties. Essentially, the court divided the assets acquired during the relationship and marriage equally and gave each his or her separate property.1 It did not abuse its discretion in doing so. Nor is it apparent from the record Bostain has provided that the court abused its discretion in finding Bostain in contempt of court and in ordering that he pay attorney fees and a penalty of $50 per day until he complied with the court's order. Thus, we affirm.

FACTS

Relationship

Bostain and Nelson met in December 1990, while Nelson was out with her church singles group. Bostain was married at the time. He separated from his wife in April 1991, and filed for dissolution of the marriage in October of that same year.

Nelson had also been married, but her husband died in 1988, in a car accident that also seriously injured her. Nelson had been living with her grandmother while recovering from her injuries. Bostain began staying with Nelson in August 1991.

In April 1992, Nelson purchased a home on Palm Drive in Kelso, Washington, with funds she received from her deceased husband's employer, a railroad company. In May, Bostain moved in with her.

Bostain worked as a pipe fitter at Weyerhaeuser and Nelson stayed home with her son from her previous marriage.2 Nelson would cook and clean house and do 'all the regular things you do as a stay at home wife, mother.' 1 Report of Proceedings (RP) at 23. Bostain would also cook. Bostain paid $300 per month in 'rent' to Nelson. 2 RP at 172.

The two spent no significant time apart and maintained a relationship similar to that of a married couple. They traveled together to Hawaii, Las Vegas, and Reno and attended car shows together. Nelson estimated that Bostain proposed to her 10 times during their relationship before they were eventually married in January 1999. Nelson testified that if she had married Bostain, she would have lost her late husband's railroad pension that she was using to raise her son.3

Following the April 1993 dissolution of his marriage, Bostain received money from the sale of his prior home and wanted to apply the proceeds to the purchase of another home. Bostain and Nelson searched for a new home together but found nothing suitable. Nelson went to a real estate agent she knew who helped them locate property on Sparks Drive in Kelso near the Palm Drive residence. Bostain bought the unimproved lot for $17,933.92. Nelson testified that she paid the $2,000 earnest money on the property, although Bostain asserted that he paid her back.

The couple also hired a contractor and went to Portland to select a design for the new home. Bostain paid the contractor a down payment of

$33,235 from his separate funds and took out a loan for the remaining $80,000. Nelson testified that she participated in nearly all aspects of putting together the new home, helping to select everything from siding to carpeting. Bostain's testimony downplayed Nelson's involvement as merely giving 'her opinion and her opinion only.' 2 RP at 192-93. Nelson provided the appliances for the new home from her Palm Drive residence.

At the time, Nelson was concerned that title to this home (that, she testified, the parties considered 'ours') was being taken in Bostain's name alone. It was because of this concern that, in November 1993, Bostain quit claimed the property 'for and in consideration of love and affection . . . to Learl Leroy Bostain and Denise Cheryl Nelson.' Ex. 6. At trial, Bostain testified that he transferred the property because he wanted Nelson, not his children from a prior marriage, to have the property if he died.

Nelson and Bostain moved into the Sparks Drive residence in February 1994.4 Nelson paid Bostain $300 per month she paid the utilities and wrote Bostain a check for the remainder with the notation 'house payment.' 1 RP at 118. She also paid the property taxes on the residence.

The two also generally paid for their own clothing and cars and kept separate bank accounts. They purchased a 1965 Corvette together and built a garage for it at the Sparks Drive residence. Nelson wrote checks for over $6,000 for materials for the garage.

At trial, Bostain introduced a document called the 'Amended: Non-Marital Agreement,'5 which the parties apparently executed in November 1993. Ex. 14. Bostain had it prepared by Alan Rudberg, a non-lawyer whom

Nelson referred to as a 'pretend attorney.' 1 RP at 72. The non-marital agreement provided that Bostain and Nelson would be responsible for their own expenses and that property each acquired would remain separate. It also provided that Bostain would be responsible for a $300 payment to Nelson while he resided with her and, if Bostain were to 'purchase and reside in any other residence . . . {and Nelson chooses to reside with him}, then she shall assume the same financial considerations that {Bostain} is currently obligated to make to her.' Ex. 14. The document was signed by Bostain and Nelson and notarized by P. Stuart McAllister in Cowlitz County on November 2, 2003. At trial, Nelson acknowledged that she thought it was her signature on the document because '{n}obody else could write like me.' 1 RP at 68. But she had no recollection of meeting with Rudberg nor reading or signing the document. She had no recollection of the parties having shared financial information at the time nor did she receive any legal advice regarding the document. Bostain testified that they entered into the agreement at Nelson's request because 'she was concerned about {his} ex-wife or children getting her property.' 2 RP at 185.

In November 1997, the parties transferred the Sparks Drive property back into Bostain's name via quit claim deed. Nelson testified that she only agreed to the transfer because they were trying to settle a claim against Louisiana-Pacific (LP) for faulty siding and LP raised an issue of title; Nelson and Bostain agreed they would put her name back on the title once the matter was settled. Bostain testified that they made the second transfer because he was no longer worried about his health after successful

heart surgery.

Marriage

Bostain and Nelson married on January 12, 1999. After they married, each put the other on their checking accounts and they invested jointly in a Continental Investors account. Bostain retired6 in January 2002 when Weyerhaeuser offered him early retirement and he received a pension buyout payment of $251,736. He also received his 401(k) account and a performance share account from Weyerhaeuser.

Dissolution

Nelson petitioned for dissolution of the marriage on April 12, 2002. Trial occurred on December 5 and 12, 2002. At trial, Nelson sought her separate property (which consisted of investments and various accounts) plus half of the property acquired during their relationship and marriage.

On February 18, 2003, the court entered its findings and conclusions. The court found a meretricious relationship beginning in May 1992 and entered 'Additional Findings of Fact' regarding the meretricious relationship. Clerk's Papers (CP) at 95. The court found the non-marital agreement invalid, stating:

The court finds that neither party had the advice of attorneys, that there was not full disclosure of assets of the parties, that the parties did not know their legal rights with regard to their relationship and that {Nelson} could not waive rights she did not know she had. In addition, there was failure of proof as to the circumstances surrounding the alleged execution of the document. No attorney was involved in drafting the agreement.

CP at 91.

The court also characterized the property, awarded each party his or her separate property, and split community property and 'community-like' property acquired during the meretricious relationship evenly between the two, with the exception of their joint investment account, which it split according to their contributions. Among other things, the court found that the Sparks Drive residence, which it valued at $157,000, was community or community-like property, subject to an offset of Bostain's $49,000 separate property contribution. The court adopted in its findings Nelson's version that Bostain said he would transfer the Sparks property back to joint ownership after the LP matter was resolved.

The court also found 10/35 (the ratio of the number of years of the relationship and marriage to the number of years of Bostain's employment) of Bostain's Weyerhaeuser pension to be community property. The court also identified the portions of Bostain's 401(k) and performance-sharing plan contributed during the meretricious relationship and marriage and divided the amount between Bostain and Nelson. The court ordered that Bostain pay Nelson $123,424.

CR 60(b) Motion

On April 4, after the court entered its February 18 findings and conclusions, but before entry of the May 15 final decree, Bostain brought a 'CR 60 Motion for Relief from Judgment' based on Bostain's discovery of an excise tax affidavit in Nelson's handwriting stating that Bostain 'was adding {Nelson} to this property because he had a bad heart and thought he was going to die. Then on Aug. 21, 1997, he had open-heart surgery and he

is well now and going to live so that is why she's giving the property back to Learl L. Bostain.' CP at 104. Bostain urged the court to 'reopen the trial.' CP at 115. In the motion, he also argued that the parol evidence rule would prevent the court from considering evidence contradicting the 1997 transfer of the property to Bostain individually. Although the underlying basis is not entirely clear from Bostain's motion, he also urged the court to 'reopen' its decision regarding the non-marital agreement, asserting that the agreement was valid under the law regarding pre-nuptial agreements.

Following a May 14, 2003 hearing, the trial court entered a May 28 written order denying the motion, finding that Bostain had not met his burden under CR 60 because there was no mistake (CR 60(b)(1)), no new evidence that could be considered for the first time (CR 60(b)(3)), and no fraud (CR 60(b)(4)).

Decree and Contempt

The court entered a decree of dissolution on May 15, 2003, after a one-day trial regarding personal property. Bostain and Nelson were to exchange property on June 3, 2003.

Bostain filed his first notice of appeal on June 4, 2003.

On June 30, 2003, Nelson moved that the trial court find Bostain in contempt for failing to permit the transfer of certain items awarded to her. Nelson submitted a declaration from Robert Argle, the individual whom the court had charged to oversee the personal property transfer. On July 18, 2003, relying on this declaration, the trial court issued a letter ruling ordering a $1,000 sanction for Bostain's willful refusal to transfer

the property and a $50-per-day sanction for every day after August 15, 2003, that Bostain did not return the property.

On August 12, 2003, the court again found Bostain in contempt for failing to transfer certain property and set an August 31, 2003 transfer deadline and ordered him to pay $50 for every day past that date that the property was not returned.7 Then, on September 12, the court ordered Bostain to pay $1,000 attorney fees 'for the contempt previously ordered based on the 8/25/03 attorney fee declaration.'8 Order Den. Mot. for Recons. attached to Am. Notice of Appeal.

ANALYSIS

Meretricious Relationship

Bostain contends that the trial court erred in determining that he and Nelson entered into a meretricious relationship in May 1992 that continued until their marriage.

'A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.' Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Our Supreme Court developed the equitable 'meretricious relationship' doctrine because the legislature has not provided a statutory means of resolving the property distribution issues that arise when individuals who have lived in a marital-like relationship and acquire what would have been community property had they been married. See In re Marriage of Lindsey, 101 Wn.2d 299, 678 P.2d 328 (1984). Income and property acquired during a meretricious relationship should be characterized in a manner similar to income and property acquired during

marriage. Therefore, there is a rebuttable presumption that both parties owned all property acquired during a meretricious relationship. Connell, 127 Wn.2d at 351 (citing Estate of Madsen v. Comm'r of Internal Revenue, 97 Wn.2d 792, 796, 650 P.2d 196 (1982)). And all property considered to be owned by both parties is before the court and is subject to a just and equitable distribution. Connell, 127 Wn.2d at 351 (citing Lindsey, 101 Wn.2d at 307). In sum, once a trial court determines the existence of a meretricious
relationship, the trial court then: (1) evaluates the interest each party has in the property acquired during the relationship and (2) makes a just and equitable distribution of the property. Connell, 127 Wn.2d at 349 (citing Lindsey, 101 Wn.2d at 307).

To determine the existence of a meretricious relationship, the trial court must consider five factors on a case-by-case basis: (1) continuous cohabitation; (2) duration of the relationship; (3) purpose of the relationship; (4) pooling of resources and services for joint projects; and (5) intent of the parties. In re Marriage of Pennington, 142 Wn.2d 592, 601-02, 14 P.3d 764 (2000).

We review the trial court's finding of a meretricious relationship as a mixed question of law and fact. '{T}he trial court's factual findings are entitled to deference, but the legal conclusions flowing from those findings are reviewed de novo.' Pennington, 142 Wn.2d at 602-03. The court considers the factors equally and need not analyze each factor separately; these 'factors are neither exclusive nor hypertechnical.' Pennington, 142 Wn.2d at 602.

First, the trial court found that Bostain and Nelson cohabitated continuously from May 1992 until and after their marriage in 1999. Bostain argues that it is improper to count the time that Bostain was married to another person, but he cites no authority for this proposition. Moreover, although Bostain's dissolution was not final until a year later, he separated from his wife in April 1991, and filed for dissolution in October of that same year. Cf. Pennington, 142 Wn.2d at 597, 603 (for asserted 10-year period of meretricious relationship: one party was married the majority of time parties lived together; parties separated, dated other people, and lived apart; and when resumed living together, had a nonsexual relationship).

Second, the court found that the duration of relationship 10 years without interruption weighed in favor of finding the existence of a meretricious relationship. Bostain does not dispute that this factor supports the existence of a meretricious relationship here.

Third, the court found that '{t}he purpose of the relationship was a marital-type of relationship. The parties provided mutual love, caring, support, sex, friendship and companionship. Basically, the parties treated one another as though they were married.' CP at 95 (emphasis added). Bostain does not appear to dispute the court's findings on this factor, but he implies that a court should disregard this because in Pennington, where the court found no meretricious relationship existed, the court had made a similar finding. But here we hold that the trial court's finding is supported by substantial evidence and that it weighs in favor of a meretricious relationship.

Fourth, the court found that Bostain and Nelson did not have joint accounts until they were married, but they had pooled their resources and services in other ways. For example, Nelson 'contributed to the cooking, cleaning and assisted with the decorating, planning and building of the Sparks Drive residence, as well as contributing financially to the Corvette, the . . . mortgage and the building of a garage on the property.' CP at 95. Moreover, '{t}he parties . . . made joint decisions throughout the relationship.' CP at 95. Bostain argues that the result in Pennington should have controlled the trial court's decision. We disagree. While Bostain and Nelson maintained a certain degree of financial independence, the trial court, on substantial evidence, found several factors not present in Pennington: Bostain and Nelson built a home during the relationship and Nelson helped plan the home. Nelson also contributed to the mortgage payments and paid the taxes and other home-related expenses. Substantial evidence supports the trial court's finding that Bostain and Nelson pooled their resources.

Fifth, the trial court here found that the parties intended 'to be in a marriage-like or meretricious relationship.' CP at 96. Bostain proposed to Nelson several times, they purchased a car together, built a home and garage together, and Bostain worked out of the home as the primary income earner so Nelson could stay home with her son. The trial court acknowledged that Bostain and Nelson offered different explanations for these activities, but it found Nelson's explanation more credible.
On appeal, Bostain argues that the non-marital agreement sets out the intent of the parties and the trial court must enforce it. But the court

found that the couple's actual practice, including the fact that they married, outweighed any evidence of intent stated over five years earlier in the non-marital agreement.

The record contains substantial evidence supporting the trial court's finding of a meretricious relationship and we will not disturb its judgment.

Enforcement of Non-Marital Agreement

As noted above, Bostain contends that the couple's non-marital agreement is a valid pre-nuptial agreement that controls property distribution. But the trial court ruled that the agreement failed the test for valid prenuptial agreements. Bostain did not argue for an alternative standard at trial. But on appeal, he also argues that the trial court erred in considering 'parol evidence' about the agreement.

Parol Evidence Rule

In general we do not review an alleged error not raised at trial. RAP 2.5(a). Bostain did not object to the admission of the alleged parol evidence until he incorporated a parol evidence argument in his CR 60(b) motion. In this motion for new trial he asserted fraud as a basis for relief from judgment based on 'discovery' of an excise tax affidavit and argued that Nelson should not have been permitted to 'testify contrary to the . . . Non-Marital Agreement.' CP at 113. But the non-marital agreement was not the asserted basis for Bostain's CR 60(b) motion. Thus, Bostain's objection to the court's consideration of parol evidence is not properly preserved for our review.

But we take the time to note that Bostain's argument misreads the parol

evidence rule. '{P}arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.' Buyken v. Ertner, 33 Wn.2d 334, 341, 205 P.2d 628 (1949).9 The parol evidence rule only applies to a writing intended by the parties as an 'integration' of their agreement, i.e., a writing intended as the final expression of the agreement's terms. Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). Thus, in determining whether an agreement is integrated, the trial court may properly consider evidence of negotiations and circumstances surrounding the formation of the contract. M.A. Mortenson Co. v. Timberline Software Corp., 93 Wn. App. 819, 827, 970 P.2d 803 (1999) (citing Denny's Rests., Inc. v. Sec. Union Title Ins. Co., 71 Wn. App. 194, 202, 859 P.2d 619 (1993)), aff'd, 140 Wn.2d 568 (2000). Bostain's argument presupposes that the non-marital agreement was an integrated, valid, and complete agreement between the parties. But these matters were clearly disputed. Particularly in light of the fact that the parties married, it is clear that the 'non-marital' agreement was not the final expression of an agreement between the parties. The trial court did not err in refusing to enforce the 'non-marital' agreement on this ground.

Prenuptial Agreement

In the alternative, Bostain urges us to treat the agreement as a prenuptial agreement under DewBerry v. George, 115 Wn. App. 351, 62 P.3d 525, review denied, 150 Wn.2d 1006 (2003). DewBerry set out the controlling test for valid prenuptial agreements from In re Marriage of

Matson, 107 Wn.2d 479, 730 P.2d 668 (1986), as follows:

The first prong of Matson asks whether the agreement made a fair and reasonable provision for the spouse not seeking enforcement. If the answer is yes, the agreement is valid. If the answer is no, the second prong asks whether there was full disclosure of the value and nature of the property involved and whether there was full knowledge and independent advice about each spouse's rights.

115 Wn. App. at 364.

The non-marital agreement at issue here fails to satisfy either prong of this test. First, the agreement disproportionately favors Bostain and does not make a fair and reasonable provision for Nelson. More importantly, as the favored party, Bostain had the burden to show 'full and fair disclosure of all material facts' to Nelson before she signed the agreement. Friedlander v. Friedlander, 80 Wn.2d 293, 302, 494 P.2d 208, (1972). Although an exact accounting of the property is not required, Friedlander, 80 Wn.2d at 302, he did not meet his burden of demonstrating that Nelson had been provided a full and fair disclosure of all material facts. The 'non-marital' agreement signed over five years before the couple married was not a valid pre-nuptial agreement and the trial court had no duty to enforce it.10

Parol Evidence Rule and Quit Claim Deed

Bostain also argues that the trial court improperly considered parol evidence to invalidate the 1997 quit claim deed transferring interest in the Sparks Drive property from joint ownership back to Bostain

individually.

Bostain did not raise this parol evidence claim below. Nor did he show that the quit claim deed was a complete, integrated agreement between the parties to which the parol evidence rule might apply. More importantly, because all property acquired during a meretricious relationship is presumed to be owned by both parties and is subject to a just and equitable distribution by the court,11 the character of the Sparks Drive property would not likely alter the trial court's property distribution decision. The fact that title has been taken in the name of one of the parties does not rebut the presumption of common ownership. Connell, 127 Wn.2d at 351 (citing Lindsey, 101 Wn.2d at 306-07; Merritt v. Newkirk, 155 Wash. 517, 520, 285 P. 442 (1930)).

Once the trial court found a meretricious relationship, unless Bostain rebutted the presumption of common ownership, the community-like property acquired by either party during the relationship was before the trial court for just and equitable distribution. Here the trial court found that Bostain and Nelson intended to create joint ownership in the residence and that the property was transferred back to Bostain in 1997 only because of the LP lawsuit. Substantial evidence supports these findings and the trial court did not err.

Denial of CR 60(b) Motion for Relief from Judgment

Bostain also contends that the trial court erred in denying his CR 60(b)(3) motion for relief from judgment12 based on 'newly discovered evidence.' Br. of Appellant at 31. We disagree.

In its order denying Bostain's motion, the trial court found:

{Bostain} did not exercise due diligence in discovering the excise tax affidavit presented in {his} CR60 motion for the first time. Specifically, both parties had signed the excise tax affidavit and both parties had equal knowledge of its existence but neither party produced {it} at trial.

CP at 154.

We review a trial court decision on whether to vacate an order under CR 60(b) for abuse of discretion. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999), review denied, 140 Wn.2d 1026 (2000). A court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. Luckett, 98 Wn. App. at 309-10.

Under CR 60(b)(3), a litigant may move a trial court to vacate a judgment in light of '{n}ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).' See Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn. App. 127, 142, 990 P.2d 429 (1999), aff'd on other grounds, 146 Wn.2d 740 (2002).

In Isla Verde, we stated that the moving party had no basis to bring the motion because '{t}he untimely proffered evidence came from sources under the {moving party's} control.' 99 Wn. App. at 142. Here, Bostain signed the excise tax affidavit and, with minimal diligence, could have produced the tax affidavit at trial. Bostain's argument that the document was not actually available because both he and Nelson had forgotten about it lacks merit. Whether Bostain and Nelson forgot about the affidavit is not the standard required by CR 60(b)(3).

Nor does Bostain's argument that the property distribution was obtained by fraud entitle him to relief. He relies on Pettet v. Wonders, 23 Wn. App. 795, 599 P.2d 1297, review denied, 93 Wn.2d 1002 (1979), which dealt with vacation of a judgment for fraud where a party raised substantial questions of whether certain evidence had been forged and perjury committed at trial. 23 Wn. App. at 800-01. Although Bostain repeatedly implies that Nelson committed fraud or perjured herself, the trial court specifically determined that Nelson did not commit fraud: Both parties' declarations indicated that they had forgotten about the affidavit. The trial court did not abuse its discretion in refusing to grant Bostain relief from the judgment on grounds of fraud.

Contempt Order and Attorney Fee Award

Finally, Bostain contends that the court erred in finding him in contempt. The trial court entered two orders in connection with this finding: (1) an August 12, 2003 contempt order that he pay $50 per day for every day past August 31, 2003, that he did not return certain personal property to Nelson; and (2) a September 12, 2003 order that he pay $1,000 in attorney fees.

A court in a dissolution proceeding has the authority to enforce its decree in a contempt proceeding. In re Marriage of Mathews, 70 Wn. App. 116, 126, 853 P.2d 462, review denied, 122 Wn.2d 1021 (1993). In the absence of an applicable special statute, or when a special statute exists but does not address a particular point of law governing contempt proceedings, the general contempt provisions in chapter 7.21 RCW apply. Under these statutory contempt provisions, the trial court has discretion

to impose remedial sanctions if necessary.

A remedial sanction is 'a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.' RCW 7.21.010(3). Under RCW 7.21.030(2),

{i}f the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment . . . .

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

In addition to imposing a remedial sanction, a court in a civil contempt action may 'order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.' RCW 7.21.030(3) (emphasis added).

Punishment for contempt is within the trial court's sound discretion and we will not disturb it on appeal absent an abuse of that discretion.

Mathews, 70 Wn. App. at 126; see also Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman, 126 Wn.2d at 40.

Bostain bore the burden of both production and persuasion regarding his claimed inability to comply with the court's order. See Moreman, 126 Wn.2d at 40. And in order to fulfill this burden, Bostain had to offer evidence that the trial court found credible. See Moreman, 126 Wn.2d at 40-41.

Remedial Sanction for Contempt

Bostain argues on appeal that he should not have to pay $50 per day until the property which he asserts is one mirror that he does not have is returned. He asserts that there was substantial evidence before the court that he did not have the mirror and thus he lacked the ability to comply with the court's order. Bostain refers to 'two declarations besides his own' indicating that he does not have the mirror. Br. of Appellant at 13. He cites to CP at 73-76. But in neither set of clerk's papers do these pages correspond to any declaration and we have not found such declarations in the record.

The trial court had discretion to impose the remedial sanction of $50 per day to secure the return of several items. Substantial evidence in the record supports the trial court's findings that Bostain possessed the various items that the trial court ordered him to return. See RAP 10.3(a)(5) (brief of appellant must contain citations to relevant parts of

record). Thus, we affirm the finding of contempt and the remedial sanction.

Payment of Attorney Fees for Contempt

Bostain also asserts that the court erred in imposing attorney fees for the contempt proceedings because the trial court made no finding as to their reasonableness.

As part of its August 12, 2003 'Order on Show Cause,' the court awarded Nelson 'attorney fees for having to bring the contempt motion.' Ord. on Show Cause re Contempt/J. attached to Am. Notice of Appeal. The amount of attorney fees was 'to be established upon presentation of {Nelson's attorney's} affidavit.' Ord. on Show Cause re Contempt/J. attached to Am. Notice of Appeal. The September 12 order further stated 'attorney's fees are assessed for the contempt previously ordered based on the 8/25/03 attorney fee declaration.' Ord. Den. Mot. for Recons. attached to Am. Notice of Appeal.

The challenged order does not state that the $1,000 attorney fees are 'reasonable' as required by RCW 7.21.030(3). But the order references an attorney fee declaration that is not included in the record on appeal.

The party seeking review bears the burden of perfecting the record so that an appellate court has before it all of the evidence relevant to the issue. Dash Point Vill. Assoc. v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1148, 971 P.2d 57 (1997). Bostain has failed to satisfy his burden to provide a record adequate for us to review the issues he raises. The trial court's decision must stand. See RAP 9.2(b); RAP 9.6(a); see also RAP 10.3(a)(5) (brief of appellant must cite relevant parts of record).

Thus, we affirm the trial court in all respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

MORGAN, J.

BRIDGEWATER, J.

1RCW 26.09.080 states:

In a proceeding for dissolution of the marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

2 Nelson asserts that she is disabled and unable to work because she

suffers from constant pain due to the fact that she broke her neck in the car accident. Bostain disputes this and points out that Nelson exercises, went dancing with him, and performed house work.

3 Nelson's son, Shane, was born in 1979.

4 Nelson sold the Palm Avenue residence in April 1994, and she kept the proceeds of the sale in her separate account.

5 Bostain testified, 'There was {a document} made up before, but {Nelson} didn't like it and we made up another one . . . {t}o her satisfaction.' 2 RP at 186.

6 At the time of trial, Bostain was also receiving unemployment compensation of $496 per week.

7 It is unclear from the record and Bostain's briefing whether the court enforced the terms of the July 18 letter ruling, i.e., whether it required Bostain to pay $50 per day for the dates between August 15 and August 31.

8 That attorney fee declaration does not appear in the record.

9 See also Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) ('extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent').

10 In his reply brief, for the first time, Bostain also urges this court to find the agreement valid based on sample agreements found in Washington Practice. See 21 Kenneth W. Weber, Washington Practice: Family and Community Property Law sec.sec. 57.36-.37, at 368-78 (1997). Similar to the requirement of full disclosure in the case of prenuptial agreements, these sample forms contain language advising the parties of their rights.

For example, one sample agreement states: '{P}arties intend . . . {to} supercede any rights either party may have under {Lindsey, 101 Wn.2d 299}, line of cases and other cases and statues defining the rights and duties of people living together without marriage.' 21 Wash. Practice sec. 57.36, at 369. See also 21 Wash. Practice sec. 57.37, at 376. Such language is not present in the non-marital agreement here and is precisely what the trial court found lacking.

11 Connell, 127 Wn.2d at 351.

12 Bostain's Assignment of Error No. 11 refers to this as a motion for reconsideration. See CR 59(b).